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IN THE

Supreme Court of the United States

October Term, 1956

No. 522

JANET R. PARKER,

Petitioner,

v.

CATHERINE R. HOWELL, CATHERINE S. CRESS, and CHARLES RICHARD SCHNEIDER,

Respondents.

In the Matter of the Estate of Gertrude Louise Richards, Deceased, Walker Bank and Trust Company, Executor

PETITION FOR REHEARING ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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"No State shall make or enforce any law which shall abridge the privileges or immunities of the Citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person the equal protection of the laws".

In The

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In the Matter of the Estate of Gertrude Louise Richards, Deceased, Walker Bank and Trust Company, Executor

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PETITION FOR REHEARING ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Janet R. Parker, petitioner, presents her petition for a rehearing of this Court's order dated December 10, 1956, denying the petition for a writ of Certiorari to the Supreme Court of the State of Utah, and, in support thereof, respectfully shows as follows:

Point 1.

THE COURT OF ORGINIAL JURISDICTION, IN FAILING TO STRICTLY APPLY THE RULES OF EVIDENCE, OR TO PROPERLY INSTRUCT THE JURY CONCERNING THE BURDEN OF PROOF TO BE CARRIED BY THE CONTESTANTS HAS DENIED PETITIONER THE PRIVILEGES AND IMMUNITIES GUARANTEED TO CITIZENS OF THE UNITED STATES.

It is universally agreed that by virtue of Article 4 Section 2 of the 14th Amendment to the Constitution of the United States that the privileges and immunities of the citizens of all free governments, cannot be abridged by the States.

Slaughter House Cases—16 Wall 36. Further the privileges and immunities which are common to citizens in those states under their constitution and laws by virtue of their being citizens therein. Paul v. Virginia 75 US 168.

This case reaches to the very heart of these privileges and immunities. Material facts in the case, and material points of law—both the law of the land and law of the jurisdiction, have been ignored in order to find against the petitioner.

Petitioner, Janet Parker, was declared to be a non-resident of the State of Utah. Respondent, Catherine Howell, was declared a resident of the State. Prior to the decease of Gertrude Louise Richards, certain rules of law were firmly established in the State relating to jury trials guaranteed by the State Constitution, Article 1, Section 10. One of these rules of evidence and law concern the burden of proof in cases where testimentary capacity is at issue.

Heretofore the Court always endeavored to instruct the jury as to the burden of proof. Suddenly, though requested to do so, and for no apparent reason, the trial judge refused to instruct the jury on the burden of proof for the petitioner. His statement justifying his refusal—that it was "given by implication"—was an admission of an error which deliberately allowed the jury in this case to commence its deliberations without proper knowledge of the law to be applied; or how to decide the facts from the evidence submitted, and so permitting them to render a decision against the petitioner which was based on their own personal opinions and prejudices against non-residents.

On first appeal these errors were recognized by the Supreme Court of Utah by the following statements. (Petitioner's Petition P. 15, 16)

> "The function of an instruction on burden of proof is to tell the jury how it should weigh the evidence. Where the evidence is so equally balanced that it is impossible to say on which side lies the greater probability of truth, or where the preponderance of the evidence is against the truth of a certain proposition, a verdict must be returned against the party who has the burden, because he has failed to show that his allegation is more convincing as to its truth . . . It would seem to have been desirable to give the requested instruction for complete clarity of understanding by the jurors" . . .

Nevertheless this recognized error was permitted to stand and both, testatrix and petitioner, have been deprived to this time, of the privileges and immunities of residents of the State of Utah, or the equal protection of the law relating to jury trials within the State.

The above statement of the State Supreme Court of Utah implies that the requested instruction to the jury, as made by the petitioner, on the burden of proof is a proper duty of the trial judge in all jury trials within

the State; that it is usually given, but that in this case it was not given even though it would have been desirable to do so. In this manner, the jury was allowed to discriminate against a non-resident in favor of a local resident.

Point 2.

THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY ON THE BURDEN OF PROOF WAS A DENIAL OF WHAT IS INTENDED BY TRIAL BY JURY.

Justice Frankfurter stated the rule to be that a trial by jury as guaranteed by the Constitution of the United States and by the several states presupposes a jury under proper guidance by a disinterested and competent trial judge. Wilkerson v. McCarthy 336 US 53, 54. This implies a jury under proper instructions as to the law. O'Donnell v. Elgin J. & E. Ry. Co., 338 US 384, 389, 394.

The term "trial by jury" is, and for ages has been, well known in the meaning of the law. It was used at the adoption of the constitution, and always, it is believed, before that time, and almost always since that time, in a single sense:

A jury for the trial of a cause is a body of men, described as being upright, disinterested and impartial, free from all bias in favor of or against either party, duly impaneled under the direction of a competent court, duly sworn to render a verdict according to the law and the evidence given them, and who, after hearing the evidence, and receiving instructions from the court as to the law involved in the trial, decides the facts of the case from the evidence adduced at the trial.

The province of the jury is strictly limited to questions of fact, and within that province they are further restricted to the consideration of matters proved by evi-

dence in the co course of the trial. They must submit to the direction of of the judge as to any rule or principle of law that may b be applicable to the case. They are not, like the judges, es, members of a class charged with the duty of judicial ial inquiry. Hence a body of men selected as a jury, but it not subject to judicial direction in the hearing of the ca case or in making up their findings, is not a jury, within th the meaning of the constitution. Capital Traction v. Hof of 174 US 1, 13; Slocum v. New York Life Insurance Compa pany 228 US 364.

Petitioner has as a right to a full statement of the law on burden of proof f from the trial court—neglect to give such statement is rev eversible when the jury consequently falls into error. Bird rd v. United States 180 US 356. Moreover, as was the case se with petitioner, the refusal of the trial court to give a r requested instruction is a reversible error where the conclusion is irresistible from the evidence that the jury based it its award on a mistaken theory . . . and the refusal was not corrected by general observations in the main on the particular question, no matter how correct they might it have been. Pennsylvania Railroad v. Jacoby and Com mpany 242 US 89; Carlton v. Utah 130 US 83.

The necessity of these rules to the petitioner is seen from an examination of the evidence in the case of petitioner herein. No No person ever testified, indeed not even the contestants, and no person who had ever seen her maintained, that Gertrude Louise Richards was at any time incompetent it to execute a legal codicil to a legal will previously executed "except when she was asleep". Her physician of twenty seven years, Doctor Galligen, when asked his interpretation of competency, (Trans of Record p. 284) testified:

"Well, if I may generalize, I believe a person to be competent if they are conscious and know the difference between right and wrong. I think if their memory is

unquestioned, if they have the power of decision, that they have definite action in everything they do, and also evidence of will power, to make decisions, that I thought Miss Richards had."

The three witnesses to the codicil, all men of legal and business training, who had observed or known Miss Richards, testified, by direct and positive testimony, and in complete agreement, as to the clarity of her mind, and both the range and precision of her recollection at the time the codicil was reviewed with her, signed, and duly witnessed in accordance with the laws of the State of Utah. Yet, unaccountably, except for the doubtful testimony of a paid witness, only doubtfully qualified as an expert, who had never seen or observed the deceased; but who gave negative, timorously hesitant testimony to the effect that there might have been some occasions upon which a person in the condition hypothesized for Miss Richards (upon factually incorrect foundation) would lack testimentary competence. The jury, being uninstructed on the burden of proof, denied Gertrude Louise Richards, her right to bequeath and devise her property, as she explicitly directed. The law of evidence has been overruled and a jury permitted to set aside the kindly ministrations of affection displayed by the deceased upon mere suspicion aroused by allegations made but never sustained, or because the codicil did not conform to the ideas of some of the members of the jury as to what the deceased should have done to comply with their own point of view.

This despite the long established law, in both the Courts of Utah and this Court as rendered by this Court in Aetna Life Insurance Company v. Moore 231 US 543 wherein this Court held that the State Court was in error by its refusal to instruct the jury in the case on which they were sitting, that an untrue answer in a life insurance policy, if material, would avoid the policy, regard-

less of the good faith of the party, and that the refusal called for a reversal of the judgment entered on the general verdict, where the evidence as to untruthfulness was conflicting, because by the verdict being general, it was impossible to say what view the jury took.

Moreover, this Court in United Protherhood C.T. v. United States 330 US 395-91 L. Ed. 973 stated that failure to charge the jury correctly is not harmless where the verdict may have resulted from the incorrect instruction; and that the error was aggravated by the Court's failure to give correct charge on request. And to the same effect Bruno v. United States 308 US 287.

The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a proper verdict, so far as it is competent for the court to assist them. Indeed, one of the most important duties of the Court is to expound the law to the jury, and in its instructions it should inform the jury as to the burden of proof. The law of every case belongs to the Court; and in a jury trial it is not only the prerogative of the judge, but his solemn duty to declare it, especially where requested to do so. The reason was long ago stated in Pleasants v. Font 89 US 116, 121 thus:

"It is the duty of a court in its relation to the jury, to protect the parties from unjust verdicts, arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to the jury the issues they are to try, and by instructing them in the rules of law by which the evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or is contrary to law." All of which has to this time been denied to the petitioner.

ONCLUSION

The principle inv
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ve been set. Other citizens will have
hey cannot fully trust the validity of
isions and that their rights may be
in proceedings not necessarily bound
We believe that serious error has
a rehearing should be granted to
with previous decisions of the Courts
rm to the rule of this Court to review
ourt where a Federal right has been
a finding shown by the record to be

without evidence to support it. United Gas Public Service Comm. v. State of Texas 303 US 123.

Respectfully submitted:

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CERTIFICATE OF COUNSEL

I John J. Spriggs Jr, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to grounds specified in Rule 58 of the rules of this Court.

Counsel for Petitioner.

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